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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 HELEN GREENE JOHNSON, *et al.*,

4 Plaintiffs,

New York, N.Y.

5 v.

24 Civ. 872 (DEH)

6 UNITED STATES OF AMERICA,

7 Defendant.
8 -----x

9 May 1, 2024
10 12:05 p.m.

11 Before:

12 HON. DALE E. HO,

13 U.S. District Judge

14 APPEARANCES

15 SHANIES LAW OFFICE

16 Attorneys for Plaintiffs

17 BY: DAVID SHANIES

18 BY: DEBORAH FRANCOIS

19 DAMIAN WILLIAMS

20 United States Attorney for the
21 Southern District of New York

22 BY: ILAN STEIN

JEFFREY S. OESTERICH

Assistant United States Attorneys

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names
3 for the record, starting with the plaintiffs.

4 MR. SHANIES: Good morning, your Honor. For the
5 plaintiffs Muhammad Aziz and Helen Greene Johnson, David
6 Shanies.

7 MS. FRANCOIS: Deborah Francois, your Honor. Good
8 morning.

9 THE COURT: Good afternoon. Please have a seat.

10 MR. STEIN: Good morning, your Honor. Ilan Stein from
11 the U.S. Attorney's office on behalf of the government.

12 MR. OESTERICHER: I'm Jeff Oestericher, Assistant
13 United States Attorney, on behalf of the government.

14 THE COURT: Good afternoon. Please have a seat.

15 So we are here today for an initial pretrial
16 conference and I do have a few questions, but hopefully this
17 won't take too long. Thank you for coming in in-person today.

18 Before I get to the things I meant to ask you about,
19 one thing that I want to disclose for the record in the
20 interest of transparency, is that a member of the plaintiff's
21 counsel team, Mr. Ellis, was a student of mine at one point
22 when I was an adjunct professor at Brooklyn Law School, it was
23 I believe more than five years ago but less than 10 years ago;
24 I can't remember precisely when. We haven't had a live
25 conversation since he was a student but I do think we shared a

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1 couple of e-mails around the time of my nomination or
2 confirmation. I don't believe that that relationship is any
3 kind of basis for recusal, but I did want to disclose it in the
4 interest of transparency. And, obviously, if the government
5 feels otherwise, it can file a motion at any time.

6 With that, I just want to dive in to the conference
7 today. It's helpful for me, I feel like when I have parties
8 before me for the first time to just get a general overview of
9 a case from each side so I will ask you to do that, just
10 something really quick, nothing too in depth.

11 I have a question about consolidation of the two
12 matters, a question about whether or not any kind of reference
13 for settlement would be helpful. I assume not, but I did want
14 to confirm that with everyone, and then just talk about the
15 proposed case management plan and a few discovery issues that
16 were flagged in the parties' joint letter, and of course
17 anything else the parties would like to raise with me today.

18 Does that sound like a plan going forward?

19 MR. SHANIES: Yes, your Honor.

20 THE COURT: OK. So why don't I start with
21 Mr. Shanies. Why don't you please give me a brief overview of
22 the matter or matters from each of the plaintiff's
23 perspectives.

24 MR. SHANIES: Sure, your Honor.

25 So these are Federal Tort Claims Act cases. Our

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1 clients were -- well, one of our clients, Muhammad Aziz, and
2 the deceased spouse of our other client Helen Greene Johnson,
3 who is the estate representative of Khalil Islam, her husband
4 of many years, were wrongfully convicted of the murder of
5 Malcolm X in 1966 -- I should say wrongfully convicted in 1966
6 of the murder that occurred in 1965. There has been a great
7 deal of ink spilled about the case. There were allegations
8 that they had the wrong people from the very outset of the case
9 but our clients were convicted. And despite numerous efforts
10 offer the years to have those convictions overturned, it was
11 not until a couple of years ago when the Manhattan District
12 Attorney's office agreed to reinvestigate the case, that it a
13 real deep dive was done into it and that process, which we
14 engaged in along with our co-counsel at The Innocence Project,
15 working cooperatively with the district attorney's office,
16 found that not only was there compelling evidence of our
17 clients' innocence, and I use the term "our clients" referring
18 to Mr. Islam as well, but an unbelievable amount of evidence of
19 their innocence had been intentionally hidden by both the FBI
20 and the NYPD for decades. The conduct of the FBI being
21 particularly egregious, as was emphasized by District Attorney
22 Cy Vance at the hearing where our clients were exonerated
23 actually involved the FBI Director J. Edgar Hoover for the
24 record permanently, he personally intervened to dictate that
25 information that would have been absolutely crucial for our

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1 clients to defend themselves, not be disclosed even to the city
2 law enforcement authorities let alone the defendants and their
3 attorneys.

4 So, at the culmination of a two-year long process, our
5 clients were exonerated. There has been other litigation
6 related to other government misconduct in the case. There was
7 a case filed in the Eastern District against the City of New
8 York. There was also a case in the New York Court of Claims
9 under the New York State Unjust Conviction and Imprisonment
10 statute so this is the third and final phase of the civil
11 litigation involving the case against the FBI and FBI agents
12 arising from the concerted effort to hide evidence of our
13 client's innocence, to interfere with witnesses, and coerce and
14 compel false testimony at their trial and that's the crux of
15 this case.

16 THE COURT: Thank you, Mr. Shanies.

17 Mr. Stein, is there anything you would like to add
18 from the government's perspective?

19 MR. STEIN: Your Honor, just very briefly.

20 We just filed our opening papers for motion to
21 dismiss. This is a case that is almost 60 years old and this
22 was a city investigation, state prosecution, not a federal
23 case. We think that there are strong grounds to dismiss each
24 of the claims. As an initial matter, we think that the claims,
25 at least three of the claims are untimely so that's negligence,

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1 negligent infliction of emotional distress, intentional
2 infliction of emotional distress; we think all of those are
3 untimely. The malicious prosecution claim, we think the
4 government hasn't waived sovereign immunity as to that claim
5 and then we think there are independent reasons to dismiss each
6 of those claims and refer your Honor to our papers rather than
7 going through it here with you.

8 THE COURT: Thank you, Mr. Stein.

9 I appreciate each of you giving me that quick
10 overview. Let me ask you, Mr. Stein, on the issue of
11 consolidation, my recollection is in the joint letter the
12 government thinks that these cases should be consolidated. Is
13 that right?

14 MR. STEIN: We do, your Honor, in the interest of
15 efficiency and easy administration of the case. A simple
16 example, we basically have to file the same papers twice and
17 will have to continue to do so. We don't see any good reason
18 to continue to have to do that so our position is the case
19 should be consolidated.

20 THE COURT: I haven't gone over the motions to dismiss
21 with a fine tooth comb yet but they are identical?

22 MR. STEIN: They are.

23 THE COURT: Thank you.

24 Mr. Shanies, any objection to me consolidating the
25 case?

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1 MR. SHANIES: We do not oppose consolidation.

2 THE COURT: So I will, either today or later this
3 week, issue an order formally consolidating the case so it will
4 hopefully make everyone's lives a little bit easier in terms of
5 efficiency and the logistics.

6 Now, the joint letter, if I can turn to the issue of
7 settlement, indicated to me that the plaintiffs believe that
8 some conversation about settlement might be appropriate. The
9 government is maybe not opposed to that but maybe would like to
10 do that at a different time, perhaps after the motion to
11 dismiss is resolved, if there is still something to settle at
12 that point, so I just want to confirm that you don't want a
13 referral to either a magistrate judge or to the district's
14 mediation program at this time.

15 Is that right, Mr. Shanies? Or, do you? Maybe I am
16 wrong.

17 MR. SHANIES: Really, I think that is a question that
18 has to be directed to the government. We have expressed a
19 willingness to explore any means of trying to resolve the case
20 but it takes two to tango and it's not really clear to us that
21 there is any meaningful desire to engage in those discussions.

22 THE COURT: Stein.

23 MR. STEIN: Yes, your Honor. We think it is
24 premature. Of course, if your Honor orders us we will, of
25 course, engage in good faith, but we think we will be in a

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1 better position once the motion to dismiss is decided.

2 THE COURT: OK. Well, in that case, I won't put in a
3 referral order at this time and we will see where we are after
4 the motion to dismiss is resolved.

5 With respect to the case management plan and the
6 discovery issues that were flagged in the parties' joint
7 letter, the case management plan itself is fine. Given the
8 absence of any definitive dates until the motion to dismiss is
9 decided what I will just ask, and I will put a line or two in
10 the plan when it's ordered on the docket, is just, I will just
11 direct the parties to, if there is still a case at that point,
12 to submit a proposed amended case management plan within, say,
13 14 days after the motion to dismiss is decided. You may have
14 some different views at that point about what the appropriate
15 timelines are in the case after you have engaged in some
16 limited discovery, which I understand you are agreeing to do.
17 Does that make sense, Mr. Shanies.

18 MR. SHANIES: Yes.

19 THE COURT: Mr. Stein?

20 MR. STEIN: Yes, your Honor.

21 THE COURT: OK. So let's talk about those discovery
22 issues. So you want, I think largely, to wait on discovery
23 with the exception of a few depositions and some things that
24 the plaintiffs would like the defendant to get started on. I
25 know the government hadn't had an opportunity to consider these

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1 issues or at least some of these issues at the time that the
2 joint submission came in but let me see if there has been any
3 progress and if you have come to any resolution on them, the
4 first one being the ESI issue. Mr. Stein, are you in agreement
5 with what the plaintiffs are asking for here or do you need
6 more time?

7 MR. STEIN: Your Honor, our position is that the vast
8 majority of what the FBI has, has already been disclosed,
9 it has already been produced on the vault online and in
10 connection with the 2020 reinvestigation that there are were
11 documents that were produced and so we are not aware of a
12 significant number of documents or additional discovery that
13 the FBI has. It may be that NARA has additional documents, we
14 just don't know at this point if that is the case, but in terms
15 of what the FBI has, our position is that there really isn't
16 much of anything to look into at this point and so we are not
17 really sure what plaintiffs want from the FBI.

18 THE COURT: Let me turn to Mr. Shanies.

19 MR. SHANIES: Yes, your Honor. I think that what
20 Mr. Stein said is really the crux of the issue, that they don't
21 know what the FBI has or doesn't have so I don't know what
22 basis or who it is who is saying that we don't think that there
23 is anything there if that's the FBI, if that's the attorneys
24 for the government who have conducted some sort of inquiry into
25 whether there are materials available but that's the inquiry

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1 that we are asking for, is to answer that question: Are there
2 materials available? And if so, what is required to obtain
3 them.

4 Your Honor said ESI and certainly we are interested in
5 ESI, but given the age of this case, it certainly is a
6 possibility that there are records in paper form somewhere and
7 will take time to retrieve from archives, etc. So what we told
8 our colleagues at the government was we are really trying to
9 avoid a situation where, assuming we get past the motion to
10 dismiss, we start issuing discovery requests and the answer is,
11 *Well, it is going to take us 12 months to get the boxes from*
12 *storage.* That's the process that we have asked them to
13 commence now and I think that is a pretty limited exercise.

14 THE COURT: The kind of thrust of what you are asking
15 for seems reasonable to me but I also didn't know what the
16 government is supposed to do if they think they've already
17 looked for everything in connection with the DA's office
18 investigation and in absence of actual discovery requests from
19 you, which I know we are trying to avoid starting up that whole
20 machinery right now and I appreciate that, but I'm not sure
21 what you are precisely asking for the government to do at this
22 point.

23 MR. SHANIES: I don't think I heard a representation
24 from the government that there are no other documents aside
25 from what was produced in connection with the DA's office

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1 investigation. If they're making that representation, then
2 that I think would be significant. It is my understanding that
3 they would not be in a position to make that representation at
4 this point, anyway, but another offer that we made was to the
5 extent that they need guidance on what exactly we are looking
6 for, we are happy to propound discovery requests that they
7 would have no obligation to respond to at this point but would
8 just serve as a guidepost for the materials we are looking for
9 but there have been certain materials made public, there
10 certainly have been many materials not made public about this
11 case, about some of the individuals involved and, in
12 particular, about former Director Hoover's involvement in the
13 matter. So locating those files and making them accessible, I
14 think, is worthwhile exercise. If the government says that
15 they've done that and there is nothing that exists, then
16 perhaps for now we will have to take that representation, but I
17 think if that is the representation, it should be made
18 explicitly, should be made by a person with knowledge, and it
19 should be made by somebody from the agency, under oath.

20 THE COURT: At this point would it make sense to ask
21 you to meet and confer on this and provide an update to the
22 Court in 14 days if you have come to some sort of agreement or
23 if there is some relief that you want?

24 MR. SHANIES: Certainly.

25 THE COURT: Does that make sense to you, Mr. Stein?

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1 MR. STEIN: It does, your Honor.

2 THE COURT: So that's what I will ask you to do on the
3 documents issue, including ESI.

4 There is also the issue of security clearances which
5 the plaintiffs have raised. Mr. Stein, is there an issue
6 there?

7 MR. STEIN: Your Honor we are not aware of any reason
8 that there would be a need for security clearances. If we
9 become aware of it we would certainly facilitate the process
10 but at this point we don't see a reason for it.

11 THE COURT: Mr. Shanies.

12 MR. SHANIES: I think it is probably tied to the same
13 issue, your Honor. I guess since the only documents that
14 they're acknowledging are the ones that have been posted on the
15 FBI's website and they're not acknowledging the existence of
16 any other documents, they're saying that they don't know of any
17 reason for a security clearance. But, of course, the question
18 is are there other documents and, if so, are they subject to
19 some sort of classification. So, I think the two questions are
20 linked.

21 THE COURT: OK. Why don't I just fold that in, then,
22 to the status report that I am asking you to provide; to meet
23 within 14 days, see if you can resolve this issue amongst
24 yourselves, but if there is some relief required you can ask
25 for it in that letter.

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1 And then there is this issue of depositions and the
2 first part of this, the plaintiff's reference I think some
3 potential additional depositions of unnamed individuals at this
4 time. It doesn't seem like you are asking from me for anything
5 right now, it is that you are flagging this issue that may come
6 up at a later time; is that right?

7 MR. SHANIES: That's right, your Honor. And just to
8 fully explain, because your Honor says that you understand that
9 we don't want to get into full discovery, of course that's not
10 really the plaintiff's position. What we agreed to was not to
11 oppose a stay of document discovery if the government would
12 agree to conduct the depositions of witnesses for whom
13 availability is in question. So, the other thing that we asked
14 as part of that was that they make their initial disclosures,
15 and to a large degree we have to look to the FBI itself to
16 identify the people who would have knowledge in this case, and
17 so until we get them identifying those folks, it is hard to
18 know who is available or could be available for deposition so
19 that's the meaning of that.

20 THE COURT: I understand. OK. So, the depositions of
21 the individuals you mentioned except for former FBI Director
22 Webster, which I will address separately, those can obviously
23 go forward, and then you can work out amongst yourselves if you
24 think it is appropriate to take additional depositions while
25 the motion to dismiss remains pending. So, by authorizing

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1 those particular depositions, I'm not saying that that's the
2 exclusive field, necessarily, and if you can't come to a
3 resolution on a particular witness, then obviously you can
4 bring that to my attention in accordance with my individual
5 rules. But, with respect to Former Director Webster, I don't
6 think the plaintiffs -- you are not asking me to do anything
7 with regard to that now, right? You are just flagging this as
8 a potential issue that you may be briefing?

9 MR. SHANIES: I think it probably will require
10 briefing; yes, your Honor.

11 THE COURT: But you are not asking me to try to
12 resolve this question now. It seems like it is a complicated
13 legal issue that if you do intend to seek his deposition would
14 require full briefing.

15 MR. SHANIES: I mean we take our cues from your Honor.
16 We do intend to seek deposition and we are happy to fully brief
17 it. I agree it hasn't been fully fleshed out on the law. I
18 think one case has been cited so far so we are happy to brief
19 the issue.

20 THE COURT: OK. So I suppose you can file that brief
21 at any time unless the parties want to set some kind of
22 schedule with respect to that now.

23 MR. SHANIES: I think we can confer with the
24 government and agree on a schedule for that.

25 THE COURT: OK. Well, as you know, you have a very

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1 high burden here, a very high standard to meet with respect to
2 high-ranking government officials like the former FBI director,
3 and part of what you need is a record showing that this is the
4 only witness, essentially, who can provide you with the
5 evidence that you need in the case and, again, that is a very,
6 very high bar. I think you all know I am relatively new to the
7 bench but I am being confronted on a daily basis with things
8 that I have zero familiarity with and I happen to learn a lot
9 about, but this is one issue that I actually do happen to know
10 a teeny bit about from my prior life and I know that the bar is
11 high and that the district court is probably not the last word
12 on an issue like this. So, I would urge to, if you do seek the
13 deposition -- and it sounds like you are intent on it -- to
14 just exercise care with such a request, it is a very important
15 issue.

16 MR. SHANIES: Understood.

17 THE COURT: Is there anything else that the parties
18 would like to address today? Mr. Shanies?

19 MR. SHANIES: Only a small issue, your Honor. The
20 page limit extension. Our colleagues graciously agreed to give
21 us the same or to agree to the same extension that they
22 received and so we would ask the Court to allow us that. I
23 believe it is 36 pages.

24 THE COURT: 36?

25 MR. SHANIES: Yes.

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1 THE COURT: OK. That's fine. Assuming, Mr. Stein,
2 you consent?

3 MR. STEIN: Yes, your Honor.

4 THE COURT: OK. Anything else, Mr. Shanies?

5 MR. SHANIES: Nothing now, your Honor.

6 THE COURT: Mr. Stein, anything else?

7 MR. STEIN: Nothing. Thank you.

8 THE COURT: OK. Thank you all very much for your time
9 today, I appreciate it, and for the helpful overviews in the
10 case and, like I said, we will try to get the case management
11 plan out sooner rather than later.

12 Thank you.

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